

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAUL E. SWAIN, III, individually,  
as next of kin of and as representative  
of the Estate of PRISCILLA M. SWAIN,  
deceased,

Plaintiff,

Civil Action No.: 1:08-cv-1941

vs.

MERCK & CO., INC.,

Defendant.

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**COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff, PAUL E. SWAIN, III, as next of kin and representative of the Estate of PRISCILLA M. SWAIN, deceased, through undersigned attorneys Levin, Papantonio et al., files this Wrongful Death Complaint, sues Defendant Merck & Company, Inc., and alleges as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1332, as complete diversity exists between Plaintiff and Defendant. Plaintiff is a resident of the State Of Oklahoma, and Defendant is incorporated and has its primary place of business in the State of New Jersey. The amount in controversy, exclusive of interest and costs, exceeds \$75,000.
2. Venue is proper within this district pursuant to Case Management Order No. 3, filed November 1, 2006, signed by John F. Keenan, allowing Fosamax-related cases to be

filed directly in the Southern District of New York.

## **II. PARTIES**

3. PRISCILLA M. SWAIN was born on January 12, 1922. At all relevant times Ms. Swain was a resident of the State of Oklahoma, and used FOSAMAX from approximately June 2002 until May 2006. Plaintiff is a citizen of the State of Oklahoma and is the surviving son of Ms. Swain. Ms. Swain died and left three children, Plaintiff, Marilyn Shafer, and Maurine K. Cullen. Plaintiff is the Independent Executrix of the Estate as adjudicated in the District Court of Tulsa County in the State of Oklahoma on November 20, 2006. In addition to his own individual interest, Plaintiff represents the interests of the Estate of PRISCILLA M. SWAIN, and the interest of the other surviving heirs, Marilyn Shafer and Maurine K. Cullen. Plaintiff brings this action to recover damages for personal injuries sustained by decedent, PRISCILLA M. SWAIN, after taking FOSAMAX.
4. Defendant is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in New Jersey. The Defendant's registered office is at 820 Bear Tavern Road, City of West Trenton, Mercer County, New Jersey.
5. Defendant was at all relevant times authorized to conduct business in the State of Oklahoma.
6. At all times relevant Defendant regularly transacted business in the State of Oklahoma and continues to do so.

7. At all relevant times Defendant, through its agents, servants, employees and apparent agents was the designer, manufacturer, marketer, distributor and seller of FOSAMAX, a bisphosphonate drug used primarily to mitigate or reverse the effects of osteoporosis.
8. Defendant, either directly or through its agents, apparent agents, servants or employees, at all relevant times, sold and distributed FOSAMAX in the State of Oklahoma for the treatment or prevention of osteoporosis, Paget's Disease and other off-label uses.
9. Defendant derives substantial revenue from pharmaceutical products used or consumed in the State of Oklahoma.
10. Defendant expected, or should have expected, that its business activities could or would have consequences within the State of Oklahoma.

### **III. SUMMARY OF THE CASE**

11. Defendant, either directly or through its agents, apparent agents, servants or employees designed, manufactured, marketed, advertised, distributed and sold FOSAMAX for the treatment of osteoporosis, Paget's Disease, and other off-label uses.
12. As a result of the defective nature of FOSAMAX, persons who were prescribed and ingested FOSAMAX, including Ms. Swain, have suffered and may continue to suffer severe and permanent personal injuries to the jaw bone, including osteonecrosis of the jaw and other diagnoses of irreversible damage to the jaw.

13. Defendant concealed its knowledge of FOSAMAX's unreasonably dangerous risks from Decedent PRISCILLA M. SWAIN, other consumers, and the medical community.
14. Defendant failed to conduct adequate and sufficient post-marketing surveillance of FOSAMAX after it began marketing, advertising, distributing, and selling the drug.
15. As a result of Defendant's actions, Ms. Swain was injured due to her ingestion of Fosamax, which caused Ms. Swain various injuries and damages including Ms. Swain's death. Plaintiff accordingly seeks compensatory damages.

#### **IV. FACTUAL BACKGROUND**

16. At all relevant times Defendant was responsible for, or involved in, designing, manufacturing, marketing, advertising, distributing, and selling FOSAMAX.
17. In September 1995, the United States Food and Drug Administration ("FDA") approved Merck's compound alendronate, which is marketed by Merck as FOSAMAX, for various uses, including the treatment of osteoporosis and Paget's Disease.
18. FOSAMAX falls within a class of drugs known as bisphosphonates. Bisphosphonates are used for treating bone conditions such as osteoporosis and Paget's disease. Other drugs within this class such as Aredia and Zometa are also used as chemotherapy and as adjunct chemotherapy but are not indicated for use in non-cancerous conditions such as osteoporosis.
19. There are two classes of bisphosphonates: the N-containing (nitrogenous) and non-N-

containing (non-nitrogenous) bisphosphonates. The nitrogenous bisphosphonates include the following: pamidronate (Aredia); ibandronate (Bondronat); and alendronate (FOSAMAX). The non-nitrogenous bisphosphonates include the following: etridonate (Didronel); clodronate (Bonefos and Loron); and tiludronate (Skelid). Alendronate, like the others, contains a nitrogen atom, whereas etridonate, clodronate, and tiludronate do not. The PDR for FOSAMAX confirms that the molecule contains a nitrogen atom.

20. Throughout the 1990s and 2000s, medical articles and studies appeared reporting the frequent and common occurrence of osteonecrosis of the jaw within the nitrogenous bisphosphonates used for chemotherapy. As with its reported and acknowledged side effects concerning irritation, erosion, and inflammation of the upper gastrointestinal tract, Merck knew or should have known that FOSAMAX, as a nitrogenous bisphosphonate, shared a similar adverse event profiles to the other drugs within this specific subclass of bisphosphonates (i.e., those containing nitrogen).
21. Merck knew and or should have known that bisphosphonates, including FOSAMAX, inhibit endothelial cell function. Similarly, Merck knew or should have known that Bisphosphonates also inhibit vascularization of the affected area and induce ischemic changes specific to patients mandibles (lower jaws) and maxillae (upper jaws) and that these ischemic changes appear to be cumulative in nature.
22. Merck also knew or should have known that these factors combine to create a compromised vascular supply in the affected area. As a result, a minor injury or

disease can turn into a non-healing wound. That in turn can progress to widespread necrosis (bone death) and osteomyelitis (inflammation of bone marrow).

23. Dentists are now being advised by state dental associations to refrain from using any invasive procedure (such as drilling a cavity) for any patient on FOSAMAX.
24. Once the osteonecrosis begins and becomes symptomatic, it is very difficult to treat and is not reversible.
25. Shortly after Defendant began selling FOSAMAX, reports of osteonecrosis of the jaw and other dental complications among users began surfacing, indicating that FOSAMAX shared the class effects of the other nitrogenous bisphosphonates. Despite this knowledge, Defendant failed to implement further study risk of osteonecrosis of the jaw relative to FOSAMAX. Rather than evaluating and verifying the safety of FOSAMAX with respect to osteonecrosis of the jaw, Defendant proposed further uses of FOSAMAX, such as FOSAMAX-D, and sought to extend the exclusivity period of FOSAMAX through 2018.
26. Osteonecrosis of the jaw is a serious medical event and can result in severe disability and death.
27. Since FOSAMAX was released, the FDA has received a number of reports of osteonecrosis of the jaw among users of FOSAMAX.
28. On August 25, 2004, the United States Food & Drug Administration ("FDA") posted its ODS Postmarketing Safety Review on bisphosphonates - - specifically pamidronate (Aredia), zoledronic acid (Zometa), risedronate (Actonel), and

alendronate (FOSAMAX). This was an epidemiologic review of the FDA adverse events database conducted by the FDA's Division of Drug Risk Evaluation.

29. As a result of the FDA Review, the FDA observed that the risk of osteonecrosis of the jaw was not confined to bisphosphonates used for chemotherapy. The FDA's review indicated that the osteonecrosis of the jaw was a class effect which specifically extended to the oral bisphosphonate, FOSAMAX.
30. As a result, the FDA recommended and stated that the labeling for FOSAMAX should be amended by Merck to specifically warn about the risk of osteonecrosis of the jaw. Merck has refused to accede to the FDA's request and, to this day, still does not warn of the risk of osteonecrosis of the jaw in its FOSAMAX labeling.
31. Rather than warn patients, and despite knowledge known by Defendant about increased risk of osteonecrosis of the jaw on patients using FOSAMAX, Defendant continues to defend FOSAMAX and minimize unfavorable findings.
32. FOSAMAX is one of Defendant's top selling drugs. Averaging more than \$3 billion a year in sales.
33. Consumers, including Ms. PRISCILLA M. SWAIN, who have used FOSAMAX for treatment or prevention of osteoporosis, Paget's Disease and/or other off-label uses, have several alternative safer products available to treat their conditions.
34. Defendant knew of the significant risk of dental and oral complications caused by ingestion of FOSAMAX, but Defendant did not adequately and sufficiently warn consumers, including PRISCILLA M. SWAIN, or the medical community, of such

risks:

35. As a direct result, Ms. Swain was prescribed FOSAMAX and was permanently and severely injured, having suffered serious consequences from the ingestion of FOSAMAX. Until her death, Ms. Swain required extensive ongoing medical care and treatment as a result of these injuries.
36. Ms. Swain suffered from mental anguish from the knowledge that she would have life-long complications as a result of the injuries she sustained from the use of FOSAMAX. The complications ultimately led to her death on May 28, 2006.
37. Ms. Swain was prescribed and began taking FOSAMAX in June 2002.
38. Ms. Swain used FOSAMAX as prescribed and in a foreseeable manner.
39. As a direct and proximate result of using FOSAMAX, Ms. Swain suffered a severe injury that eventually led to her death.
40. Ms. Swain, as a direct and proximate result of using FOSAMAX, suffered severe mental and physical pain and suffering, permanent injuries, emotional distress and death.
41. Ms. Swain used FOSAMAX which had been provided to her in a condition that was substantially the same as the condition in which it was manufactured and sold.
42. Ms. Swain would not have used FOSAMAX had Defendant properly disclosed the risks associated with the drug. Alternatively, Ms. Swain would have known the precursor events of osteonecrosis of the jaw and would have been able to avoid the clinical manifestation of the symptoms as they currently exist.



43. Defendant, through its affirmative misrepresentations and omissions, actively concealed from Ms. Swain and her physicians the true and significant risks associated with taking FOSAMAX. The running of any applicable statute of limitations has been tolled by reason of Defendant's fraudulent concealment.
44. As a result of Defendant's actions, Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations.

### **COUNTS**

#### **COUNT I: NEGLIGENCE**

45. Plaintiff re-alleges the above paragraphs as if fully set forth herein.
46. Defendant owed Ms. Swain, and other consumers, a duty to exercise reasonable care when designing, manufacturing, marketing, advertising, distributing, and selling FOSAMAX.
47. Defendant failed to exercise due care under the circumstances and therefore breached this duty by:
- a. failing to properly and thoroughly test FOSAMAX before releasing the drug to market;
  - b. failing to properly and thoroughly analyze the data resulting from the pre-marketing tests of FOSAMAX;

- c. failing to conduct sufficient post-market testing and surveillance of FOSAMAX;
- d. designing, manufacturing, marketing, advertising, distributing, and selling FOSAMAX to consumers, including Ms. Swain, without an adequate warning of the significant and dangerous risks of FOSAMAX and without proper instructions to avoid the harm which could foreseeably occur as a result of using the drug;
- e. failing to exercise due care when advertising and promoting FOSAMAX; and
- f. negligently continuing to manufacture, market, advertise, and distribute FOSAMAX after Defendant knew or should have known of its adverse effects.

48. As a direct and proximate consequence of Defendant's actions, omissions, and misrepresentations, Ms. Swain sustained serious injuries resulting in decedent's death.
49. Paul E. Swain, III is the Personal Representative of the Estate of Priscilla M. Swain. A copy of the Letters of Administration is attached as Exhibit A.
50. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations. Priscilla M. Swain died, leaving survivors as defined by New York law.
51. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.

52. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future.

**COUNT II: STRICT LIABILITY**

53. Plaintiff re-alleges the above paragraphs as if fully set forth herein.
54. Defendant manufactured, sold, distributed, marketed, and/or supplied FOSAMAX in a defective and unreasonably dangerous condition to consumers, including Ms. Swain.
55. Defendant designed, manufactured, sold, distributed, supplied, marketed, and/or promoted FOSAMAX, which was expected to reach and did in fact reach consumers, including Plaintiff, without substantial change in the condition in which it was manufactured and sold by Defendant.
56. Ms. Swain used FOSAMAX as prescribed and in a manner normally intended, recommended, promoted, and marketed by Defendant.
57. FOSAMAX failed to perform safely when used by ordinary consumers, including Ms. Swain, including when it was used as intended and in a reasonably foreseeable manner.
58. FOSAMAX was defective in its design and was unreasonably dangerous in that its unforeseeable risks exceeded the benefits associated with its design or formulation.
59. FOSAMAX was defective in design or formulation in that it posed a greater

likelihood of injury than other similar medications and was more dangerous than an ordinary consumer could reasonably foresee or anticipate.

60. FOSAMAX was defective in its design and was unreasonably dangerous in that it neither bore nor was packaged with nor accompanied by warnings adequate to alert consumers, including Ms. Swain, of the risks described herein, including, but not limited to, the risk of osteonecrosis of the jaw.
61. Although Defendant knew or should have known of the defective nature of FOSAMAX, it continued to design, manufacture, market, and sell FOSAMAX so as to maximize sales and profits at the expense of the public health and safety. By so acting, Defendant acted with conscious and deliberate disregard of the foreseeable harm caused by FOSAMAX.
62. Ms. Swain and her physicians could not, through the exercise of reasonable care, have discovered FOSAMAX's defects or perceived the dangers posed by the drug.
63. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations. Priscilla M. Swain died, leaving survivors as defined by New York law.
64. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.

65. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future.

**COUNT III: BREACH OF EXPRESS WARRANTY**

66. Plaintiff re-alleges the above paragraphs as if fully set forth herein.
67. Defendant expressly represented to Ms. Swain, her physicians, other consumers and the medical community that FOSAMAX was safe and fit for its intended purposes, was of merchantable quality, did not produce any dangerous side effects, and had been adequately tested.
68. FOSAMAX does not conform to Defendant's express representations because it is not safe, has numerous and serious side effects, and causes severe and permanent injuries.
69. At all relevant times FOSAMAX did not perform as safely as an ordinary consumer would expect, when used as intended or in a reasonably foreseeable manner.
70. Ms. Swain, her physicians, other consumers, and the medical community relied upon Defendant's express warranties.
71. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations.

Priscilla M. Swain died, leaving survivors as defined by New York law.

72. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.

73. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future:

**COUNT IV: BREACH OF IMPLIED WARRANTY**

74. Plaintiff re-alleges the above paragraphs as if fully set forth herein.

75. Defendant manufactured, distributed, advertised, promoted, and sold FOSAMAX.

76. At all relevant times, Defendant knew of the use for which FOSAMAX was intended and impliedly warranted the product to be of merchantable quality and safe and fit for such use.

77. Defendant was aware that consumers, including Ms. Swain, would use FOSAMAX for treatment or prevention of osteoporosis or Paget's Disease and for other off-label purposes.

78. Ms. Swain, her physicians, and the medical community, reasonably relied upon the judgment and sensibility of Merck to sell FOSAMAX only if it was indeed of merchantable quality and safe and fit for its intended use.

79. Defendant breached its implied warranty to consumers, including Ms. Swain;

FOSAMAX was not of merchantable quality or safe and fit for its intended use.

80. Consumers, including Ms. Swain, her physicians, and the medical community, reasonably relied upon Defendant's implied warranty for FOSAMAX.
81. FOSAMAX reached consumers including Ms. Swain without substantial change in the condition in which it was manufactured and sold by Defendant.
82. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations. Priscilla M. Swain died, leaving survivors as defined by New York law.
83. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.
84. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future.

**COUNT V: FRAUDULENT MISREPRESENTATION**

85. Plaintiff re-alleges the above paragraphs as if fully set forth herein.
86. Defendant made fraudulent misrepresentations with respect to FOSAMAX in the following particulars:

a. Defendant represented through its labeling, advertising, marketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions that FOSAMAX had been tested and found to be safe and effective for the treatment of osteoporosis and Paget's Disease; and

b. Defendant represented that FOSAMAX was safer than other alternative medications.

87. Defendant knew that its representations were false, yet it willfully, wantonly, and recklessly disregarded its obligation to provide truthful representations regarding the safety and risk of FOSAMAX to consumers, including Ms. Swain, her physicians and the medical community.

88. The representations were made by Defendant with the intent that doctors and patients, including Ms. Swain and her physicians, rely upon them.

89. Defendant's representations were made with the intent of defrauding and deceiving Ms. Swain, other consumers, and the medical community to induce and encourage the sale of FOSAMAX.

90. Ms. Swain, her physicians and others relied upon the representations.

91. Defendant's fraudulent representations evinced its callous, reckless, willful, and depraved indifference to the health, safety, and welfare of consumers, including Ms. Swain.

92. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had



been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations. Priscilla M. Swain died, leaving survivors as defined by New York law.

93. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.
94. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future.

**COUNT VI: FRAUDULENT CONCEALMENT**

95. Plaintiff re-alleges the above paragraphs as if fully set forth herein.
96. Defendant fraudulently concealed information with respect to FOSAMAX in the following particulars:
- a. Defendant represented through its labeling, advertising, marketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions that FOSAMAX was safe and fraudulently withheld and concealed information about the substantial risks of using FOSAMAX; and
  - b. Defendant represented that FOSAMAX was safer than other alternative medications and fraudulently concealed information which demonstrated that FOSAMAX was not safer than alternatives available on the market.

97. Defendant had sole access to material facts concerning the dangers and unreasonable risks associated with FOSAMAX.
98. Defendant's concealment of information about the risks associated with taking FOSAMAX was intentional, and the representations made by Defendant were known by Defendant to be false.
99. The concealment of information and the misrepresentations about FOSAMAX were made by Defendant with the intent that doctors and patients, including Ms. Swain and her physicians, rely upon them.
100. Ms. Swain, her doctors, and others relied upon the representations and were unaware of the substantial dental and oral risks associated with taking FOSAMAX that Defendant had concealed from them.
101. Ms. Swain and her prescribing physicians were unaware, and could not have reasonably known or have learned through reasonable diligence, that Ms. Swain had been exposed to the risks identified in this complaint, and that those risks were the direct and proximate result of Defendant's acts, omissions, and misrepresentations. Priscilla M. Swain died, leaving survivors as defined by New York law.
102. The Estate of Priscilla M. Swain suffered a loss of net accumulations due to the premature death of Priscilla M. Swain, and the personal representative incurred medical and funeral expenses for the burial and funeral services of the deceased.
103. Defendant's conduct as described above was committed with knowing, conscious, wanton, willful, and deliberate disregard for the value of human life and the rights

and safety of consumers such as Ms. Swain, thereby entitling her estate to punitive damages so as to punish Defendant and deter it from similar conduct in the future.

**VI. GLOBAL PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. compensatory damages on each cause of action;
- b. punitive damages on each cause of action;
- c. reasonable attorneys' fees where recoverable;
- d. costs of this action; and
- e. such other additional and further relief as the Court may deem necessary, appropriate, and just.

**DEMAND FOR JURY TRIAL**


Plaintiff demands a trial by jury on all counts and issues so triable.

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MEGHAN M. TANS  
TIMOTHY O'BRIEN  
LEVIN, PAPANTONIO, THOMAS, MITCHELL,  
ECHSNER & PROCTOR, P.A.  
316 South Baylen Street, Suite 600 (32502)  
P. O. Box 12308  
Pensacola, Florida 32591  
Telephone(850) 435-7084  
FAX (850) 435-7020

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all counts and issues so triable.



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IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

In the Matter of the Estate of )

PRISCILLA MANLEY SWAIN )

Deceased )

No PB-2006-863

DISTRICT COURT  
FILED

NOV 20 2006

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLAHOMA  
TULSA COUNTY

LETTERS TESTAMENTARY

The Last Will and Testament of PRISCILLA MANLEY SWAIN, having been proved and recorded in the District Court of the County of Tulsa, State of Oklahoma, and the Petitioner having been named in the Will to serve as Personal Representative herein:

PAUL E. SWAIN III is hereby appointed Personal Representative.

WITNESS, Honorable Linda G. Morrissey, Judge of the District Court, Tulsa County, State of Oklahoma, this 22 day of June, 2006.

LINDA G. MORRISSEY

JUDGE OF THE DISTRICT COURT

Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma, hereby certifies that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this

NOV 20 2006

By

Brenda J. Crowell  
Deputy

EXHIBIT: A



STATE OF OKLAHOMA )

SS

COUNTY OF TULSA )

I, PAUL E. SWAIN III, do solemnly swear that I will faithfully perform according to law the duties of Personal Representative of the Estate of Priscilla Manley Swain. So Help Me God.



Paul E. Swain III

Subscribed and sworn to before me this 20 day of

 2006

LINDA G. MORRISSEY

JUDGE OF THE DISTRICT COURT



JS 44C/SDNY  
REV. 12/2005

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

<b>PLAINTIFFS</b> PAUL E. SWAIN, III, individually, as next of kin of and as representative of the Estate of PRISCILLA M. SWAIN, deceased	<b>DEFENDANTS</b> MERCK & CO., INC.
<b>ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)</b> LEVIN, PAPANTONIO, ET. AL., 316 S. BAYLEN STREET, SUITE 600, PENSACOLA, FL 32591	<b>ATTORNEYS (IF KNOWN)</b> Meghan M. Tans, Timothy M. O'Brien
<b>CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)</b> 28 U.S.C. 1332 PRODUCT LIABILITY - DEFECTIVE PHARMACEUTICAL (Fosamax)	
Has this or a similar case been previously filed in SDNY at any time? No <input type="checkbox"/> Yes? <input checked="" type="checkbox"/> Judge Previously Assigned <b>KEENAN</b>	
If yes, was this case Vol. <input type="checkbox"/> Invol. <input type="checkbox"/> Dismissed. No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> If yes, give date _____ & Case No. _____	
(PLACE AN [x] IN ONE BOX ONLY) <span style="float: right;">NATURE OF SUIT</span>	

		ACTIONS UNDER STATUTES			
		TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<b>CONTRACT</b> <input type="checkbox"/> 110 INSURANCE <input type="checkbox"/> 120 MARINE <input type="checkbox"/> 130 MILLER ACT <input type="checkbox"/> 140 NEGOTIABLE INSTRUMENT <input type="checkbox"/> 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT <input type="checkbox"/> 151 MEDICARE ACT <input type="checkbox"/> 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS) <input type="checkbox"/> 153 RECOVERY OF OVERPAYMENT OF VETERANS BENEFITS <input type="checkbox"/> 160 STOCKHOLDERS SUITS <input type="checkbox"/> 190 OTHER CONTRACT <input type="checkbox"/> 195 CONTRACT PRODUCT LIABILITY <input type="checkbox"/> 196 FRANCHISE	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 AIRPLANE <input type="checkbox"/> 315 AIRPLANE PRODUCT LIABILITY <input type="checkbox"/> 320 ASSAULT, LIBEL & SLANDER <input type="checkbox"/> 330 FEDERAL EMPLOYERS' LIABILITY <input type="checkbox"/> 340 MARINE <input type="checkbox"/> 345 MARINE PRODUCT LIABILITY <input type="checkbox"/> 350 MOTOR VEHICLE <input type="checkbox"/> 355 MOTOR VEHICLE PRODUCT LIABILITY <input type="checkbox"/> 360 OTHER PERSONAL INJURY	<b>PERSONAL INJURY</b> <input type="checkbox"/> 352 PERSONAL INJURY - MED MALPRACTICE <input checked="" type="checkbox"/> 365 PERSONAL INJURY PRODUCT LIABILITY <input type="checkbox"/> 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY  <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 OTHER FRAUD <input type="checkbox"/> 371 TRUTH IN LENDING <input type="checkbox"/> 380 OTHER PERSONAL PROPERTY DAMAGE <input type="checkbox"/> 385 PROPERTY DAMAGE PRODUCT LIABILITY	<input type="checkbox"/> 810 AGRICULTURE <input type="checkbox"/> 820 FOOD & DRUG <input type="checkbox"/> 825 DRUG RELATED SEIZURE OF PROPERTY <input type="checkbox"/> 830 LIQUOR LAWS <input type="checkbox"/> 840 RR & TRUCK <input type="checkbox"/> 850 AIRLINE REGS <input type="checkbox"/> 860 OCCUPATIONAL SAFETY/HEALTH <input type="checkbox"/> 890 OTHER  <b>LABOR</b> <input type="checkbox"/> 710 FAIR LABOR STANDARDS ACT <input type="checkbox"/> 720 LABOR/MGMT RELATIONS <input type="checkbox"/> 730 LABOR/MGMT REPORTING & DISCLOSURE ACT <input type="checkbox"/> 740 RAILWAY LABOR ACT <input type="checkbox"/> 790 OTHER LABOR LITIGATION <input type="checkbox"/> 791 EMPL RET INC SECURITY ACT	<input type="checkbox"/> 422 APPEAL 28 USC 158 <input type="checkbox"/> 423 WITHDRAWAL 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 COPYRIGHTS <input type="checkbox"/> 830 PATENT <input type="checkbox"/> 840 TRADEMARK  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 MIA (1395FF) <input type="checkbox"/> 862 BLACK LUNG (923) <input type="checkbox"/> 863 DIWC (405(g)) <input type="checkbox"/> 863 DIWW (405(g)) <input type="checkbox"/> 864 SSID TITLE XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 TAXES <input type="checkbox"/> 871 IRS-THIRD PARTY 20 USC 7609	<input type="checkbox"/> 400 STATE REAPPORTIONMENT <input type="checkbox"/> 410 ANTITRUST <input type="checkbox"/> 430 BANKS & BANKING <input type="checkbox"/> 450 COMMERCE/ICC RATES/ETC <input type="checkbox"/> 460 DEPORTATION <input type="checkbox"/> 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO) <input type="checkbox"/> 480 CONSUMER CREDIT <input type="checkbox"/> 490 CABLE/SATELLITE TV <input type="checkbox"/> 810 SELECTIVE SERVICE <input type="checkbox"/> 850 SECURITIES/COMMODITIES/EXCHANGE <input type="checkbox"/> 875 CUSTOMER CHALLENGE 12 USC 3410 <input type="checkbox"/> 891 AGRICULTURE ACTS <input type="checkbox"/> 892 ECONOMIC STABILIZATION ACT <input type="checkbox"/> 893 ENVIRONMENTAL MATTERS <input type="checkbox"/> 894 ENERGY ALLOCATION ACT <input type="checkbox"/> 895 FREEDOM OF INFORMATION ACT <input type="checkbox"/> 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE <input type="checkbox"/> 950 CONSTITUTIONALITY OF STATE STATUTES <input type="checkbox"/> 890 OTHER STATUTORY ACTIONS
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 LAND CONDEMNATION <input type="checkbox"/> 220 FORECLOSURE <input type="checkbox"/> 230 RENT LEASE & EJECTMENT <input type="checkbox"/> 240 TORTS TO LAND <input type="checkbox"/> 246 TORT PRODUCT LIABILITY <input type="checkbox"/> 290 ALL OTHER REAL PROPERTY	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 VOTING <input type="checkbox"/> 442 EMPLOYMENT <input type="checkbox"/> 443 HOUSING ACCOMMODATIONS <input type="checkbox"/> 444 WELFARE <input type="checkbox"/> 445 AMERICANS WITH DISABILITIES - EMPLOYMENT <input type="checkbox"/> 446 AMERICANS WITH DISABILITIES - OTHER <input type="checkbox"/> 440 OTHER CIVIL RIGHTS	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 MOTIONS TO VACATE SENTENCE 28 USC 2255 <input type="checkbox"/> 530 HABEAS CORPUS <input type="checkbox"/> 535 DEATH PENALTY <input type="checkbox"/> 540 MANDAMUS & OTHER <input type="checkbox"/> 550 CIVIL RIGHTS <input type="checkbox"/> 555 PRISON CONDITION			

Check if demanded in complaint:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.? IF SO, STATE:

DEMAND \$ \_\_\_\_\_ OTHER \_\_\_\_\_ JUDGE **KEENAN** DOCKET NUMBER **06-MDL 1789**Check YES only if demanded in complaint  
JURY DEMAND: ☒ YES ☐ NO

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(SEE REVERSE)



(PLACE AN x IN ONE BOX ONLY)

## ORIGIN

- ☒ 1 Original Proceeding   
 ☐ 2a. Removed from State Court   
 ☐ 3 Remanded from Appellate Court   
 ☐ 4 Reinstated or Reopened   
 ☐ 5 Transferred from (Specify District)   
 ☐ 6 Multidistrict Litigation   
 ☐ 7 Appeal to District Judge from Magistrate Judge Judgment
- ☐ 2b. Removed from State Court  
 AND at least one party is a pro se litigant

(PLACE AN x IN ONE BOX ONLY)

## BASIS OF JURISDICTION

- ☐ 1 U.S. PLAINTIFF   
 ☐ 2 U.S. DEFENDANT   
 ☐ 3 FEDERAL QUESTION (U.S. NOT A PARTY)   
 ☒ 4 DIVERSITY

IF DIVERSITY, INDICATE  
CITIZENSHIP BELOW.  
(28 USC 1332, 1441)

## CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

CITIZEN OF THIS STATE	PTF DEF [ ] [ ]	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	PTF DEF [ ] [ ]	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	PTF DEF [ ] [ ]
CITIZEN OF ANOTHER STATE	<input checked="" type="checkbox"/> 2 [ ]	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ] [ ]	FOREIGN NATION	[ ] [ ]

## PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

PAUL E. SWAIN, III  
406 S. Boulder  
Suite 423  
Tulsa, OK 74103

## DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

MERCK & CO., INC.  
ONE MERCK DRIVE  
P.O. BOX 100, WS3AB-05  
WHITEHOUSE STATION, NEW JERSEY, 08889-0100

## DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE ASSIGNED TO: ☐ WHITE PLAINS ☒ FOLEY SQUARE  
(DO NOT check either box if this is a PRISONER PETITION.)

DATE 2/27/08 SIGNATURE OF ATTORNEY OF RECORD   
RECEIPT # \_\_\_\_\_

ADMITTED TO PRACTICE IN THIS DISTRICT

☐ NO  
☒ YES (DATE ADMITTED Mo. 5 Yr. 2007)  
 Attorney Bar Code # XXXXX

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge \_\_\_\_\_ is so Designated.

J Michael McMahon, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

AO 440 (Rev. 10/93) Summons in a Civil Action - SDNY WEB 4/99

# United States District Court

SOUTHERN

DISTRICT OF

NEW YORK

PAUL E. SWAIN, III, individually,  
as next of kin of and as representative  
of the Estate of PRISCILLA M. SWAIN,  
deceased

## SUMMONS IN A CIVIL CASE

V.

CASE NUMBER:

MERCK & CO., INC.

TO: (Name and address of defendant)

MERCK & CO., INC.  
C/O C T CORPORATION SYSTEM  
111 EIGHTH AVENUE  
NEW YORK, NEW YORK, 10011

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

MEGHAN M. TANS  
LEVIN, PAPANTONIO, THOMAS, MITCHELL, ECHSNER & PROCTOR, P.A.  
316 S. BAYLEN STREET, SUITE 600  
PENSACOLA, FL 32591

an answer to the complaint which is herewith served upon you, within \_\_\_\_\_ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

\_\_\_\_\_  
CLERK

\_\_\_\_\_  
DATE

\_\_\_\_\_  
(BY) DEPUTY CLERK

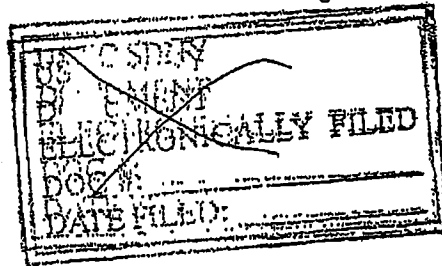
AO 440 (Rev. 10/93) Summons In a Civil Action -SDNY WEB 4/99

<b>RETURN OF SERVICE</b>		
Service of the Summons and Complaint was made by me <sup>1</sup>		DATE
NAME OF SERVER (PRINT)		TITLE
<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the defendant. Place where served: _____ _____		
<input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left: _____ _____		
<input type="checkbox"/> Returned unexecuted: _____ _____ _____		
<input type="checkbox"/> Other (specify): _____ _____ _____		
<b>STATEMENT OF SERVICE FEES</b>		
TRAVEL	SERVICES	TOTAL
<b>DECLARATION OF SERVER</b>		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p> <p>Executed on _____ Date _____ Signature of Server _____</p> <p style="text-align: right;">_____ Address of Server</p>		

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

Case 1:06-md-01789-JFK-JCF Document 110 Filed 05/30/2007 Page 1 of 3

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



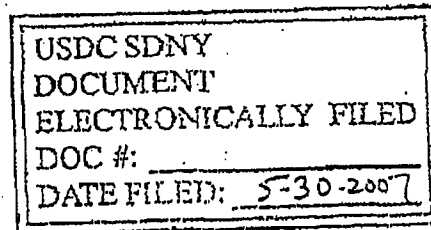
IN RE: Fosamax Products Liability  
Litigation

1:06-md-1789 (JFK)

ORDER FOR ADMISSION  
PRO HAC VICE

This Document Relates to: MDL-1789

Fredericka Allen v. Merck Case No.: 06-cv-9452  
Bridget Arcemont v. Merck Case No.: 07-cv-2389  
Virginia Bergeson v. Merck Case No.: 06-cv-9454  
Shirley Boles v. Merck Case No.: 06-cv-9455  
Sharon Bradford v. Merck Case No.: 07-cv-177  
Winnie Braswell v. Merck Case No.: 07-cv-1413  
Roberta Brodin v. Merck Case No.: 07-cv-3466  
Brenda Carpenter v. Merck Case No.: 07-cv-3464  
Sonja Daroff v. Merck Case No.: 07-cv-3462  
Debra Flores v. Merck Case No.: 07-cv-02442  
Sandra Hall v. Merck Case No.: 07-cv-3467  
Purcia Hardy v. Merck Case No.: 07-cv-797  
Carolyn Hester v. Merck Case No.: 06-cv-9450  
Pamela Hines v. Merck Case No.: 07-cv-480  
Rochelle Kenig v. Merck Case No.: 07-cv-00478  
Anna Mervin v. Merck Case No.: 07-cv-3463  
Janice Moe v. Merck Case No.: 07-cv-00479  
James Nupier v. Merck Case No.: 06-cv-9451  
Wilma Parslow v. Merck Case No.: 07-cv-3465  
Tamae Porter v. Merck Case No.: 07-cv-790  
Margaret Stelove v. Merck Case No.: 07-cv-3459  
Maxine Skute v. Merck Case No.: 07-cv-3461  
Edna Sykes v. Merck Case No.: 07-cv-1412  
Kathleen Toelke v. Merck Case No.: 06-cv-7629  
Reyna Vandercaar v. Merck Case No.: 06-cv-11329  
Nellie Wade v. Merck Case No.: 06-cv-9453  
Carol Young v. Merck Case No.: 06-cv-0531  
Bonnie Laughlin v. Merck Case No.: 07-cv-3827



Considering the Certificate of Good Standing submitted by counsel, IT IS  
HEREBY ORDERED that:

Case 1:06-md-01789-JFK-JCF Document 110 Filed 05/30/2007 Page 2 of 3

Meghan M. Tans  
Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A.  
316 S. Baylen Street, Suite 400  
P.O. Box 12308 (32591)  
Pensacola, FL 32502  
Phone: (850) 435-7181  
Facsimile: (850) 436-6181  
Email: mtans@levinlaw.com

is admitted to practice pro hac vice as counsel for the plaintiffs in the above-referenced  
MDL proceeding.

Signed this 30 day of May, 2007, at New York, New  
York.

  
UNITED STATES DISTRICT COURT JUDGE

AO 136 (Rev. 9/98) Certificate of Good Standing

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# UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

## CERTIFICATE OF GOOD STANDING

*I, Sheryl L. Loesch, Clerk of this Court,*

*certify that Meghan M. Tans, Bar # 00888745,*

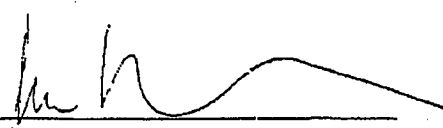
*was duly admitted to practice in this Court on*

*April 22, 2005, and is in good standing*

*as a member of the Bar of this Court.*

*Dated at Jacksonville, Florida, on May 17, 2007.*

SHERYL L. LOESCH  
CLERK

  
DEPUTY CLERK